

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CHRISTIAN RODRIGUEZ,

Plaintiff

v.

C. CROW,  
D. ALLEN,

Defendants

Case No.: 3:20-cv-00166-RCJ-WGC

**Order**

Re: ECF Nos. 1-1, 11

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 11) and pro se complaint (ECF No. 1-1).

**I. IFP APPLICATION**

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some  
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the  
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from  
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the  
7 institution and the net deposits in the applicant’s account for the six months prior to the date of  
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been  
9 at the institution for less than six months, “the certificate must show the account’s activity for  
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount  
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an  
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly  
14 deposits or the average monthly balance for the six-month period immediately preceding the  
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,  
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s  
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody  
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time  
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the  
21 last six months was \$0 and his average monthly deposits were \$147.50.

22 Plaintiff’s application to proceed IFP should be granted. Plaintiff should be required to  
23 pay an initial partial filing fee in the amount of \$29.50 (20 percent of \$147.50). Thereafter,

1 whenever his prison account exceeds \$10, he should be required to make monthly payments in  
2 the amount of 20 percent of the preceding month's income credited to his account until the \$350  
3 filing fee is paid.

## 4 II. SCREENING

### 5 **A. Standard**

6 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time  
7 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--  
8 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)  
9 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
10 § 1915(e)(2)(A), (B)(i)-(iii).

11 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if  
12 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in  
13 which a prisoner seeks redress from a governmental entity or officer or employee of a  
14 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify  
15 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--  
16 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks  
17 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

18 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
19 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and  
20 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a  
21 complaint under these statutes, the court applies the same standard as is applied under Rule  
22 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule  
23

1 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232  
2 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most  
4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,  
5 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less  
6 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9  
7 (1980) (internal quotation marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
9 action," it must contain factual allegations sufficient to "raise a right to relief above the  
10 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
11 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]  
12 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a  
13 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at  
14 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of the  
16 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
17 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
18 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

## 19 **B. Plaintiff's Complaint**

### 20 **1. Allegations**

21 Plaintiff names Detectives C. Crow and D. Allen of the Reno Police Department as  
22 defendants. He alleges that they deprived him of his right to due process as well as equal  
23 protection of the laws. He claims that Defendants ignored *Miranda v. Arizona*. He asserts that he

1 was arrested and chained to a table at the Reno Police Department and the detectives ignored his  
2 request for counsel and continued to question him after he had demanded an attorney. He seeks  
3 compensatory and punitive damages, and also asks to have his sentence vacated as a result of the  
4 alleged constitutional violations.

## 5 **2. Plaintiff's Request to Have His Sentence Vacated**

6 Preliminarily, to the extent Plaintiff asks to have his sentence vacated, such relief is only  
7 available through a petition for writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500  
8 (1973) ("[W]hen a state prisoner is challenging the very fact of or duration of [the prisoner's]  
9 physical imprisonment, and the relief [the prisoner] seeks is a determination that [the prisoner] is  
10 entitled to immediate release or a speedier release from that imprisonment, [the prisoner's] sole  
11 remedy is a writ of habeas corpus."). Therefore, insofar as Plaintiff attempts to have his sentence  
12 vacated as a result of the alleged constitutional violations, the claims should be dismissed  
13 without prejudice. *Edwards v. Balisok*, 520 U.S. 641, 649 (1997).

14 The court will now examine his allegations to the extent he seeks monetary damages.

## 15 **3. The Fifth Amendment**

16 The Fifth Amendment provides: "No person ... shall be compelled in any criminal case  
17 to be a witness against himself...." U.S. Const. amend. V. This right against self-incrimination  
18 was addressed by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966)  
19 and held: "The prosecution may not use statements, whether exculpatory or inculpatory,  
20 stemming from custodial interrogation of the defendant unless it demonstrates the use of  
21 procedural safeguards to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at  
22 444.

1 A plaintiff may proceed with a Fifth Amendment claim asserting a violation of *Miranda*  
2 if the "allegedly coerced statements were used against the suspect in a criminal case." *Stoot v.*  
3 *Everett*, 582 F.3d 910, 923 (9th Cir. 2009) (citing *Chavez v. Martinez*, 538 U.S. 760 (2003)  
4 (plurality opinion of Thomas, J. at 773, Souter, J., at 779, Stevens, J. at 787, and Kennedy, J., at  
5 799). "A coerced statement has been 'used' in a criminal case when it has been relied upon to file  
6 formal charges against the declarant, to determine judicially that the prosecution may proceed,  
7 and to determined pretrial custody status." *Stoot*, 582 F.3d at 925. If an alleged coerced statement  
8 is used at trial, it is of course "used" against the suspect in the criminal case, but "[u]se of the  
9 statement at trial is not necessary to assert a claim for violation of the Fifth Amendment." *Id.*

10 Plaintiff does not allege whether the allegedly coerced statements were used against him  
11 in the criminal proceeding; therefore, this claim will be dismissed with leave to amend.

#### 12 **4. Fourteenth Amendment Substantive Due Process**

13 *Chavez* specifically held that allegations of coercive interrogation can be brought as a  
14 substantive due process claim under the Fourteenth Amendment. *See Chavez*, 538 U.S. at 733  
15 (plurality opinion of Thomas, J.), 779 (Souter, J.), 787 (Stevens, J.), 799 (Kennedy, J.). "The  
16 standard for showing a Fourteenth Amendment substantive due process violation, however, is  
17 quite demanding." *Stoot*, 582 F.3d at 928 (noting the reference in *Chavez* to "police torture or  
18 other abuse" and Justice Kennedy's reference to "torture or its close equivalents"). "[O]nly the  
19 most egregious official conduct can be said to be 'arbitrary in the constitutional sense' and  
20 therefore a violation of substantive due process." *Id.* (quoting *County of Sacramento v. Lewis*,  
21 523 U.S. 833, 846 (1998)). "[A] Fourteenth Amendment claim of this type is cognizable only if  
22 the alleged abuse of power 'shocks the conscience' and 'violates the decencies of civilized  
23 conduct.'" *Id.* (quoting *Lewis*, 523 U.S. at 846). In *Stoot*, the court concluded that interrogation

1 techniques that allegedly involved improper promises and threats to a child fell short of what is  
2 required for a substantive due process claim based on coercive interrogation. *Id.* at 929.

3 Plaintiff has not included allegations that the interrogation amounted to "torture or its  
4 equivalents." Therefore, to the extent he seeks to assert a substantive due process claim, that  
5 claim should be dismissed with leave to amend.

## 6 **5. Equal Protection**

7 Plaintiff makes reference to equal protection of the laws.

8 The Fourteenth Amendment prohibits the denial of "the equal protection of the laws."  
9 U.S. Const. amend XIV, § 1. It "commands that no State shall deny to any person within its  
10 jurisdiction the equal protection of the laws, which is essentially a direction that all persons  
11 similarly situated should be treated alike." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9<sup>th</sup> Cir.  
12 2001) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

13 To establish a violation of the Equal Protection Clause, the prisoner must present  
14 evidence an intent to discriminate against the plaintiff based upon his membership in a protected  
15 class. *See Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

16 Where state action does not implicate a protected class, as is the case here, a plaintiff can  
17 establish a "class of one" equal protection claim by demonstrating that he or she "has been  
18 intentionally treated differently from others similarly situated and that there is no rational basis  
19 for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000);  
20 *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9<sup>th</sup> Cir. 2004), *overruled on other*  
21 *grounds by Shanks v. Dressel*, 540 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2008).

22 Plaintiff includes no allegations to support an equal protection claim. He does not allege  
23 that he was intentionally treated differently because of his membership in a protected class. Nor

1 does he allege a "class of one" equal protection claim. Therefore, the equal protection claim will  
2 be dismissed; however, the dismissal is with leave to amend.

3 **6. *Heck***

4 It is not clear at this point that the alleged constitutional violations would necessarily  
5 imply the invalidity of Plaintiff's conviction or sentence. Therefore, dismissal under *Heck v.*  
6 *Humphrey*, 512 U.S. 477 (1994) is not appropriate at this juncture.

7 **III. RECOMMENDATION**

8 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

9 (1) Plaintiff's IFP application (ECF No. 11) should be **GRANTED**; however, within **30**  
10 **DAYS** of the date of any order adopting this Report and Recommendation, Plaintiff should be  
11 required to pay, through NDOC, an initial partial filing fee in the amount of \$29.50. Thereafter,  
12 whenever his prison account exceeds \$10, he is required to make monthly payments in the  
13 amount of 20 percent of the preceding month's income credited to his account until the full \$350  
14 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful.  
15 The Clerk should be directed to **SEND** a copy of this Order to the attention of **Chief of Inmate**  
16 **Services for the Nevada Department of Corrections**, P.O. Box 7011, Carson City, Nevada  
17 89702.

18 (2) The Clerk should be instructed to **FILE** the complaint (ECF No. 1-1).

19 (3) To the extent Plaintiff asks for his sentence to be vacated as a result of the alleged  
20 constitutional violations, the claims should be **DISMISSED WITHOUT PREJUDICE**. The  
21 remainder of the Complaint should be **DISMISSED WITH LEAVE TO AMEND**.

22 (4) Plaintiff should be given **30 DAYS** from the date of any order adopting this Report  
23 and Recommendation to file an amended complaint correcting the deficiencies noted


1 above. The amended complaint must be complete in and of itself without referring or  
2 incorporating by reference any previous complaint. Any allegations, parties, or requests  
3 for relief from a prior complaint that are not carried forwarded in the amended complaint  
4 will no longer be before the court. Plaintiff shall clearly title the amended pleading as  
5 “AMENDED COMPLAINT.” If Plaintiff fails to file an amended complaint within the  
6 30 days, the action may be dismissed.

7 Plaintiff should be aware of the following:

8 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
9 this Report and Recommendation within fourteen days of being served with a copy of the Report  
10 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s  
11 Report and Recommendation” and should be accompanied by points and authorities for  
12 consideration by the district judge.

13 2. That this Report and Recommendation is not an appealable order and that any notice of  
14 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
15 until entry of judgment by the district court.

16  
17 Dated: August 24, 2020

18   
19 William G. Cobb  
20 United States Magistrate Judge  
21  
22  
23